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No. 83-402

In The
Supreme Court of the United States
October Term, 1983

SKAGGS COMPANIES, INC.,

Petitioner,

vs.

LOUIS WHATLEY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continued to accrue backpay even after the claimant's subsequent voluntary resignation from employment is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 721 (1982), decisions of other panels of the same Court of Appeals, and decisions of other Federal Courts of Appeal.

2. Whether the Court of Appeals' affirmance of the finding that the employment discrimination claimant continues to accrue backpay after the claimant's voluntary resignation and while the claimant was unavailable for work and disabled due to disability incurred while working for a subsequent employer voluntarily chosen by claimant, is consistent with this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, *supra*, decisions of other federal Courts of Appeals, and with the remedial standards of Title VII.

3. Whether disability payments in a workmen's compensation settlement received by the employment discrimination claimant for disability incurred while working for a subsequent employer after claimant's voluntary resignation should be deducted from or offset against the employer's backpay liability.

LIST OF PARTIES

1. The Petitioner is Skaggs Companies, Inc., a Delaware corporation with its principal place of business in Salt Lake City, Utah.

2. The Respondent is Louis Whatley of Mesa, Arizona.

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BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Louis Whatley hereby respectfully submits his Brief in Opposition to the Petition of Skaggs Companies, Inc. requesting a Writ of Certiorari to review the decision in this action rendered by the United States Court of Appeals for the Tenth Circuit and requests that this Court deny the petition.

STATEMENT OF THE CASE

This case arises under Title VII, 42 U. S. C. § 2000e *et seq.* of the Civil Rights Act of 1964 with additional claims based on the Civil Rights Act of 1886, 42 U. S. C. § 1981. The claimant, Louis Whatley, brought this action against Skaggs alleging that it discriminated against him because of his Hispanic national origin when it removed him from his position as lobby manager in September, 1971 in violation of Title VII, 42 U. S. C. § 2000e *et seq.* and 42 U. S. C. § 1981. The District Court found that the removal of Mr. Whatley from his position of lobby manager was in violation of these Acts. The Court of Appeals for the Tenth Circuit affirmed the decision and all back-pay findings and conclusions of the District Court.

The claimant was first employed by Skaggs on August 28, 1965 as a part-time employee, and later became a full-time employee and held several positions in retail stores of Skaggs located in the Denver metropolitan area. On November 7, 1969, Whatley was promoted to the position of lobby manager at the Skaggs Lakeside store, Store 22, and remained in that capacity through September 16, 1971.

On September 17, 1971, Whatley was terminated from that position and rehired that same day as a warehouseman and assigned to the Denver Warehouse as a clerk and remained in that capacity through June 8, 1973 when he resigned his employment with Skaggs. From the date of his resignation to November, 1975 the claimant held several jobs with various employers other than Skaggs. In November, 1975 the claimant sustained a disabling back injury while working as a "beef lugger" for Gold Star Beef Co. located in Denver, Colorado. From the date of

his injury to the date of trial, the only employment held by the claimant was the minimal assistance which he provided to his wife in the operation of a family owned billiard hall. The only year in which the claimant received any remuneration for this assistance at the billiard hall was 1975.

On November 25, 1980, the District Court issued its decision regarding the liability phase of this proceeding and held Skaggs in violation of the claimant's rights under 42 U. S. C. § 1981 as well as 42 U. S. C. § 2000e, *et seq.* (See Appendix B of the Petition.) On February 23, 1981, the District Court issued its decision regarding the remedy phase of this proceeding. (See Appendix C of Petition.) On May 9, 1983 the United States Court of Appeals for the Tenth Circuit affirmed the decisions of the District Court regarding both liability and remedy and ordered the matter remanded to the District Court on the issue of prejudgment interest on the claimant's backpay award and the attorney's fees for claimant's counsel efforts on the appeal. (See Appendix A of Petition.) On June 13, 1983 the Court of Appeals for the Tenth Circuit denied the Petitioner's request for rehearing.

REASONS FOR DENYING THE WRIT

I.

The decision of the Court below is not in conflict with the decision of this Court in Ford Motor Co. v. Equal Employment Opportunity Commission, other decisions of the Tenth Circuit or decisions of other circuits.

Ford Motor Co. v. Equal Employment Opportunity Commission.

In its "conflict" argument Skaggs argues initially that the decision of the Court below is at odds with the principles set forth by this Court in *Ford Motor Co. v. Equal Employment Opportunity Commission*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 721 (1982). The Respondent submits that Skaggs' argument of attempting to apply the principles set forth in *Ford Motor Co. v. EEOC, supra*, is misplaced and totally inapplicable to the facts here.

Ford Motor Co. v. EEOC, supra, stands for the proposition that an employer charged with discrimination in hiring under Title VII of the Civil Rights Act of 1964 can toll the continuing accrual of backpay liability under § 706 (g) of Title VII by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination. The obvious distinguishing feature of that case with the case here is that the former involves a discriminatory failure to hire while the latter involves a discriminatory termination. In *Ford Motor Co. v. EEOC, supra*, the claimants were discriminatorily denied employment and subsequently refused offers of employment by the discriminating employer to the position originally sought because they received offers of employment to more attractive positions from another employer which they accepted prior to the offers extended by the discriminating employer. Their refusal to the offers of employment from the discriminating employer, in this Court's opinion, tolled that employer's liability for backpay from the date of the refusals. At page 8 of its Petition, Skaggs states that the claimants in *Ford Motor Co. v. EEOC*, "lost their jobs

and then obtained a better job with another employer". To begin with, the claimants there never were hired by the discriminating employer initially and the question before the Court was simply whether or not a subsequent offer of employment and the claimants' refusal terminated the employer's liability for backpay. The facts in that case do not square with the facts here. Whatley was terminated from his position as lobby manager on September 17, 1971, was re-hired by Skaggs as warehouseman at a substantially lower rate of pay on that same date and resigned his warehouseman position on June 8, 1973 to accept a job which had a higher rate of pay. The representation by Skaggs at page 9 of its Petition that Whatley voluntarily resigned his position and then a year or more later accepted a position with another employer is simply not correct. Whatley was employed at all times subsequent to his resignation up to the date of his injury in November, 1975. Whatley's voluntary resignation and subsequent acceptance of higher paying jobs is consistent with his duty to mitigate his damages. There is no requirement that victim of discrimination remain in the employ of the discriminating employer at a low paying job when he can seek employment elsewhere at a higher paying job. To remain in the employ of the discriminating employer in such an instance would, in fact, be a violation of his duty to mitigate his damages in a diligent manner. A claimant such as Whatley is under no duty to "seek employment which is not consonant with his particular skills, background and experience" or "which involves conditions that are substantially more onerous than his previous position." See *NLRB v. The Madison Courier, Inc.*, 472 F. 2d 1307 (D. C. Cir. 1972). Whatley did seek and obtained more onerous and strenuous employment in

order to make more money than a Skaggs' warehouseman. This effort on his part completely fulfilled his duty to mitigate his damages. If Whatley had voluntarily resigned his employment and sat on his "duff" then Skaggs' argument would indeed have merit. Additionally, the fact that Whatley accepted a less prestigious job as a Skaggs warehouseman is indicative of his predisposition to diligently mitigate his damages to the fullest extent possible. He was under no obligation to accept the warehouseman position. See *Merriweather v. Hercules, Inc.*, 631 F. 2d 1161 (5th Cir. 1980).

This Court's holding in *Ford Motor Co. v. EEOC, supra*, has no application to the facts here and the decision of the Court below is, in no way, in conflict with it.

Decisions of the Tenth and Other Circuits

In its "conflict" argument, Skaggs also argues that the decision of the Court below is in conflict with other decisions of that circuit as well as decisions of other circuits. Skaggs argues that the decision below is in conflict with the decisions of the Tenth Circuit cases of *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975) and *Muller v. U. S. Steel Corp.*, 509 F. 2d 923 (10th Cir. 1975).

In *Taylor v. Safeway Stores, Inc., supra*, the claimant voluntarily took himself out of the job market by attending college on a full time basis in an effort to achieve higher aspirations. This case has absolutely no application to the case here. Whatley did not take himself out of the job market but instead expanded his employability by seeking more onerous positions, but higher paying positions than the job he voluntarily quit.

In dicta in *Taylor v. Safeway Stores, Inc., supra,* the Court surmised that if a discharged claimant accepts employment elsewhere that acceptance of other employment would "cut off any backpay award". It is obvious from the Court's further discussion of a "double" award that the accepted employment must be at a comparable salary when compared to the job which is the subject matter of the discrimination claim. Whatley was fired from position of lobby manager and rehired the same date as a warehouseman at a substantially lesser salary. His resignation was from the warehouseman position *not* the lobby manager position.

The case of *Muller v. United States Steel Corp., supra,* is also distinguishable from the facts here. That case involved the issue of constructive discharge. There is no such issue here as the trial court made a specific finding that Whatley was terminated from his position of lobby manager on September 17, 1971. His acceptance of the position of warehouseman on the same day had the same legal effect of his being terminated by Skaggs and then obtaining work elsewhere on the same date. Had the trial court found that Whatley was demoted and subsequently constructively discharged, Skaggs' argument would have merit. The case here is not one of constructive discharge but one of actual termination.

In addition to the cases of *Muller v. United States Steel Corp., supra,* and *Taylor v. Safeway Stores, Inc., supra,* discussed above, Skaggs argues that the decision of the Court below is in conflict with the Courts of Appeals decisions in *Bourque v. Powell Electrical Manufacturing Company,* 617 F. 2d 61 (5th Cir. 1980) and *Clark v. Marsh,* 665 F. 2d 1168 (D. C. Cir. 1981). Again, these two cases

concern the issue of whether or not the claimants were constructively discharged and whether the backpay accrual period extended beyond the date of the claimants' resignations. These cases have no application here because this case is not one of constructive discharge.

II.

The decision below that the backpay accrual period must include post-voluntary resignation periods of unavailability from the labor force, and disability incurred in voluntary employment with a subsequent employer is not in conflict with decisions of other circuits.

In support of its argument that the backpay accrual period should not include periods when Whatley was "unavailable" from the labor force Skaggs relies upon several decisions none of which have application to the factual setting here. The first case relied upon by Skaggs is, again, *Taylor v. Safeway Stores, Inc., supra.* As Whatley pointed out above, this decision has no application here because the claimant in that case voluntarily removed himself from the labor force by opting to attend college on a full-time basis rather than seeking full-time employment. He could not have done both and therefore he had to live with his choice to attend school which rendered him unavailable for full-time employment. This militated against his duty and responsibility to mitigate his damages.

In *Sprogis v. United Air Lines, Inc.*, 517 F. 2d 387 (7th Cir. 1975), another case relied upon by Skaggs, the Court affirmed the lower court's exclusion of an eight month pregnancy period from the backpay accrual period.

Such exclusion was proper there for two reasons. First, the claimant, an airline stewardess, voluntarily became pregnant thereby "disabling" herself from the work force, and second, her collective bargaining agreement with the discriminating employer specifically precluded a stewardess from flying during periods of pregnancy. The instant case does not involve a disability voluntarily incurred nor such a specific contractual prohibition.

Skaggs cites five additional cases in support of its argument: *Walston v. School Board of City of Suffolk*, 566 F. 2d 1201 (4th Cir. 1977) where pregnancy period deducted from backpay accrual period; *Ostapowicz v. Johnson Bronze Co.*, 541 F. 2d 394 (3rd Cir. 1976), *cert. denied*, 429 U. S. 1041 (1977), where periods of unavailability due to illness deducted from backpay accrual period; *Peters v. Missouri-Pacific Railroad Company*, 483 F. 2d 490 (5th Cir. 1972), *cert. denied*, 414 U. S. 1002 (1973) where periods when claimants physically unable to work deducted from backpay accrual period (no mention of the nature or cause of the physical disability); *Inda v. United Air Lines, Inc.*, 405 F. Supp. 426 (N. D. Cal. 1975), *aff'd* in part, vacated in part on other grounds, 565 F. 2d 554 (9th Cir. 1977), *cert. denied*, 435 U. S. 1007 (1978), where periods of voluntarily planned pregnancies deducted from backpay accrual period; and *Sangster v. United Air Lines, Inc.*, 633 F. 2d 864 (9th Cir. 1980), *cert. denied*, 451 U. S. 971 (1981) where periods of voluntary idleness deducted from backpay accrual period. In all of these cases with the possible exception of *Peters v. Missouri-Pacific Railroad Company, supra*, the periods of unavailability from the work force were attributable to a voluntarily planned

disability such as pregnancy, illness unrelated to the work in question or voluntary idleness of the claimant.

In *Peters v. Missouri-Pacific Railroad Company, supra,* the Court found a requirement of retirement at age 65 for black firemen to violate Title VII when their white counterparts were allowed to work until age 70. From the applicable five-year backpay accrual period the lower court deducted periods when the claimants were physically unable to work between the ages of 65 and 70. Neither decision the Court of Appeals or the trial court reveal the nature of the cause of the physical maladies of the claimants but one can reasonably assume that advanced age (65 to 70) was the likely cause of the claimant's physical problems which would not have application to the facts here.

At page 17 of its Petition, Skaggs, citing the relevant pages of the trial transcript, suggests that Whatley, after his resignation from Skaggs employ on June 8, 1973, did not look for work or obtain other employment until later in 1974-75. This suggestion by Skaggs is a misrepresentation of Whatley's testimony. Pages 178 and 179 of the trial transcript are as follows:

A. Yes, I did.

Q. Do you recall receiving a copy of your deposition to review after—

A. Yes, I did.

Q. And did you review it?

A. Yes, I have.

Q. And were the answers you gave in the deposition true?

A. The answers pertaining to the questions, yes, they were true.

Q. The answers to the questions that were asked?

A. Yes, to the best of my knowledge.

Q. Do you recall me asking you if you looked for work after you left Skaggs in 1973 in your deposition?

A. I recall that part of the deposition, yes.

Q. Would you look at page 6 of that deposition, Mr. Whatley, and would you look at line 8? Do you recall me asking you this question, it appearing at line 8, page 6 of your deposition: "Did you look for work with any other firm or organization after you left Skaggs other than your real estate business?"

And your answer, "Yes, I did."

And the next question: "And can you tell me when you did that?"

And you said, "Okay, approximately 1975 to 1977." Is that correct?

A. That's correct.

Q. Now, does that refresh your recollection as to when you looked for work between the period 1973 to 1975?

A. Yes, it does.

Q. Okay. And did you—is it your current testimony that, in fact, you looked for work between 1973 and 1975?

A. Yes, it is.

Q. So, in fact, your answer that you gave in the deposition was not correct?

A. This is—in this answer, "1975 to 1977" is when I actually filled out applications for employment with companies.

Q. Well, how would you define "looking for work"?

A. Just going out looking for jobs and talking to people, different companies, and—

Q. Now, wouldn't that involve making applications?

A. Not necessarily, not always, no.

Q. So is it your testimony now that you made application to employers only in that period 1975 to 1977?

A. 1975 to 1977, that's when I went to work for Gold Star Beef Company.

Q. But that you did look without making any applications between June of 1973 and 1975?

A. Yes, on many occasions.

Q. Now, do you recall me asking in the deposition if you would supply me with a copy of the settlement you had in the Workmen's Compensation proceeding?

Appendix A reflects that in 1973 from January to the date of his resignation on June 8 Whatley earned $3,140.18 while in the employ of Skaggs as a warehouseman. From the date of his resignation to the end of that year Whatley earned $7,606.71 while in the employ of Dillon Companies, Inc. In 1974, Whatley earned a total of $7,266.44 while in the employ of four different employers. From January, 1975 to the date of his on-the-job injury in November, 1975 while in the employ of Gold Star Beef Co. Whatley earned $9,281.48. From the date of his on-the-job injury in November, 1975 to the date of trial Whatley was disabled and in his spare time minimally assisted his wife in the

operation of a billiard hall from 1975 to 1979 and drew wages only in 1975 in the amount of $732.77 (p. 66 of App. C of Petition). Petitioner's representation that Whatley was unavailable for work from mid-1973, 1974 and 1975 is simply a misstatement of the record. There is no dispute, however, that Whatley was out of the labor market from November, 1975 to the date of trial in 1980 due to his disability which resulted from his on-the-job injury while in the employ of Gold Star Beef Co. The record is clear that Whatley mitigated his damages diligently. Further, the finding of the trial court that Whatley would not have suffered his disabling injury but for the unlawful termination by Skaggs which forced Whatley into more onerous jobs resulting in his injury while he was attempting to mitigate his damages. The trial court's ruling and its affirmance by the Court of Appeals is consistent with this Court's decision in *Ford Motor Co. v. EEOC, supra.*

III.

The decision below that state disability benefits to claimant to compensate him for periods of disability should not be offset from the backpay award does not raise a substantial federal question.

There is no dispute that Whatley received a lump sum workmen's compensation settlement from the State of Colorado in the amount of $30,126.00. This payment was clearly from a "collateral" source and awarded by the State of Colorado in furtherance of a totally separate social policy. See *Equal Employment Opportunity Commission v. Sandia Corporation,* 639 F. 2d 600 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.,* 554 F. 2d 730 (5th Cir. 1977); and *Pedreyra v. Cornell Prescription*

Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979). Furthermore, the trial court's refusal to grant Skaggs an offset of the workmen's compensation award is a matter clearly left to the discretion of the trial court not to be disturbed on appeal absent a showing of abuse of that discretion. *Camacho v. Colorado Electronic Technical College*, 590 F. 2d 887 (10th Cir. 1979) and *Taylor v. Safeway Stores, Inc.*, 524 F. 2d 263 (10th Cir. 1975). Without exception, the cases cited by Skaggs in its argument that it is entitled to an offset recognize the trial court's discretion in determining whether or not to allow an offset. The trial court here properly exercised that discretion and did not abuse it.

The workmen's compensation statute under which Whatley received his lump sum award was designed to compensate him for his injuries in furtherance of social policies of the State of Colorado totally separate and distinct from the purposes and policies of Title VII.

Skaggs has not shown that a substantial federal question has been raised as the decision of the Court below is consistent with the holdings of the cited cases that such an offset is within the discretion of the trial court.

CONCLUSION

For the reasons stated above, Respondent requests that this Court deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

(Compiled from Whatley's Trial Exhibits 19, 20 and 21 Which Were His Tax Returns and W-2 Statements for the Years 1973, 1974 and 1975)

1973

Employer	Earnings
Skaggs Companies, Inc.	$3,140.18
Dillon Companies, Inc.	7,606.71

1974

Employer	Earnings
A.C. & S., Inc.	$ 650.94
Dillon Companies, Inc.	882.12
School District No. 1	1,061.21
Gold Star Beef Co.	4,671.17

1975

Employer	Earnings
Gold Star Beef Co.	$9,281.48
Billiard Land (family business)	732.77